No. 93-1197 (6)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

Supreme Court, U.S.
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ALBERT HESS,
Petitioner,
v.
PORT AUTHORITY TRANS-HUDSON CORPORATION,
Respondent.

CHARLES F. WALSH,
Petitioner,
v.
PORT AUTHORITY TRANS-HUDSON CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Port Authority Trans-Hudson Corporation, a wholly owned subsidiary of a bistate agency created by interstate compact, is entitled to sovereign immunity from suit in federal court under the Eleventh Amendment.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling in-

terest in legal issues that affect state and local governments. In particular, *amici* representing state governments have an interest in maintaining their ability to address multi-state needs by creating entities answerable to two or more States, which enjoy the same immunity from suit as do the compacting States.

Because of the importance of this issue to *amici* and their members, *amici* submit this brief to assist the Court in the resolution of this case.[1]

SUMMARY OF ARGUMENT

The Eleventh Amendment is emblematic of the principle that in joining the federal Union, the States did not surrender all incidents of their sovereignty. Among the elements of sovereignty that they retained for themselves and entities under their control was their sovereign immunity—including immunity from suit in federal court. As the Court has noted, that immunity was retained, except insofar as its surrender was implicit in the "plan of the Convention." *Monaco* v. *Mississippi*, 292 U.S. 313, 322-23 (1934) (citation omitted). Thus, "Eleventh Amendment" immunity is not limited by the language of the Eleventh Amendment, but rather is a function of the role played by the States in forming the Union and "the respect owed them as members of the federation." *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S.Ct. 684, 689 (1993); *see also Hans v. Louisiana*, 134 U.S. 1 (1890). The historic understanding that state agencies—as arms of the State subject to state control

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

—are entitled to assert immunity from suit in federal court is a reflection of the political history of the Union.

Political history thus belies the notion that bistate agencies, subject to the control of two or more compacting States, are not entitled to the same immunity from suit that the compacting States themselves enjoy. This Court's cases establish that where (1) the compacting States intend their bistate creation to enjoy sovereign immunity, and (2) their creation remains subject to political control at the state level, a finding that the entity is entitled to "Eleventh Amendment immunity" is warranted. Unless Congress has clearly specified that such a bistate entity is not immune from suit, this Court's cases require that the entity's immunity be respected.

The conclusion that bistate agencies which are answerable to the compacting States at the level of state government retain an immunity from suit in federal court is supported by *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). In that case, the Court held that a bistate agency which sought immunity without the imprimatur of the compacting States and was created as a political subdivision, politically accountable to local government units, was not entitled to assert Eleventh Amendment immunity. In this case, however, the Port Authority has sovereign immunity because (1) the compacting States intended to grant it sovereign immunity and (2) it is under the control of, and accountable to, New Jersey and New York at the state government level. These fundamental features of the Port Authority distinguish it from the entity whose claim of immunity was rejected by the Court in *Lake Country Estates*. Con-

sequently, respondent PATH, the Port Authority's wholly owned subsidiary, is entitled to sovereign immunity.

ARGUMENT

I. THE NATURE OF "ELEVENTH AMENDMENT IMMUNITY" GUIDES ITS APPLICATION IN THIS CASE

A. The Court Has Clarified The Foundations Of Eleventh Amendment Immunity Since Its Decision In *Lake Country Estates*

1. In seeking standards for applying the Eleventh Amendment to bistate agencies formed by interstate compacts, the parties, and the courts below, have focused on *Lake Country Estates*. In *Lake Country Estates*, the Court held that there is no absolute rule extending "Eleventh Amendment immunity to every bistate agency." 440 U.S. at 400. The Court went on to hold that the entity claiming immunity in that case—a regional planning agency which was organized as a political subdivision accountable to various local governments within the compacting States, rather than to the compacting States themselves—was not immune from suit in federal court.[2] Given the organization of the entity in that case, and the compacting States' disavowal of any intention to grant it sovereign immunity, the Court determined that absent an "absolute rule" that all bistate agencies are entitled to immunity, the entity claiming immunity in that case could not avail

[2] The Court's precedents hold that while States and "arms" of the States are entitled to sovereign immunity, political subdivisions of States, such as counties and municipalities, are not. *See, e.g., Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890).

itself of "the sovereign immunity provided by the Constitution to Nevada and California." *Id.* at 402.

The Port Authority is plainly unlike the bistate entity claiming immunity in *Lake Country Estates*. Nonetheless, the factors which this Court considered in *Lake Country Estates* provide useful guidance in understanding why the Port Authority is entitled to sovereign immunity.[3] Indeed, an analysis of the two factors which the Court found determinative in *Lake Country Estates*—the absence of any intention on the part of the compacting States to confer immunity and the lack of state control of the entity—compel the conclusion that the Port Authority enjoys the immunity of the compacting States.

Petitioners suggest, however, that *Lake Country Estates* evidences a presumption against allowing bistate agencies to assert sovereign immunity. Even if *Lake Country Estates* could be said to reflect as much, such premises have not survived this Court's more recent cases elaborating on the historical and constitutional foundations of "Eleventh Amendment immunity," which should inform the application of *Lake Country Estates* to this case. *See, e.g., Puerto Rico Aqueduct*, 113 S.Ct. at 684. Indeed, the Court's more recent teachings on the subject make clear that the Port Authority enjoys the same immunity from federal court suit as is possessed by the compacting States themselves.

2. Petitioners ask the Court to focus on the language of the Eleventh Amendment, and particularly

[3] Any sovereign immunity possessed by the Port Authority is likewise available to respondent PATH, which is a wholly owned subsidiary of the Port Authority. *See* Resp. Br. 4 n.2.

its reference to "one of the United States," as support for their contention that the Port Authority is not entitled to immunity from suit in federal court. And indeed, in *Lake Country Estates* this Court observed initially that the Eleventh Amendment applies by its terms to "one of the United States." 440 U.S. at 400. The Court ultimately found "no justification for reading additional meaning into the limited language of the Amendment." *Id.* at 401.

But it is exactly this premise—that immunity from federal court suit is based on the language of the Eleventh Amendment—that has been clarified by this Court's more recent cases. The Eleventh Amendment is not the source of the States' immunity from suit in federal court. Rather, that immunity is an essential attribute of the sovereignty possessed by the States when they joined the Union.[4] As the Court has recognized, the States did not surrender this incident of their sovereignty when they ratified the Constitution, except as called for by the document itself. *See, e.g., Monaco*, 292 U.S. at 323.[5]

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[4] As Hamilton explained,

> [i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.

The Federalist No. 81, at 455 (Isaac Kramnick ed., 1987).

[5] "That a state may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit

Thus, despite

> the narrowness of its terms, [the Court has] . . . understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty . . . ; and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention."

Blatchford v. Native Village of Noatak, 111 S.Ct. 2578, 2581 (1991).[6] Moreover, it has long been recognized that agencies that are "arms of the State" partake fully of the State's sovereign immunity. *See Puerto Rico Aqueduct*, 113 S.Ct. at 687-88 ("Absent waiver, neither a State nor agencies acting under its

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brought by private parties against a state without consent given . . . ." *In Re New York*, 256 U.S. 490, 497 (1921). *See also Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468, 479-80 (1987) (plurality opinion); *Employees v. Missouri Dep't of Public Health & Welfare*, 411 U.S. 279, 291-92 (1973) (Marshall, J., concurring in the result).

[6] The historical foundation for these conclusions deserves summarizing here not only for the light that it sheds on the proper disposition of this case, but because the lower courts continue to view this Court's Eleventh Amendment jurisprudence as some sort of "creative" or "abstract impressionistic" effort at constitutional interpretation. *See Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Auth.*, 991 F.2d 935, 938 (1st Cir. 1993). That is obviously an inaccurate characterization of the Court's approach. Rather, this Court has proceeded on the basis of an historical understanding of sovereignty that survived the Constitution—and a realistic appraisal of the extent to which sovereignty was necessarily surrendered as part of the basic federal plan.

control may 'be subject to suit in federal court.' ") (citations omitted).[7]

Although the doctrine of state sovereign immunity is often discussed in connection with the Eleventh Amendment, the two are not the same. The Eleventh Amendment was crafted to overcome the suggestion that Article III of the Constitution, by establishing federal court jurisdiction over certain suits involving States, was perforce an abrogation of state sovereign immunity. *See Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). The public reaction to this Court's *Chisholm* decision—following so closely upon the ratification of the Constitution itself—confirmed that this had never been the intention of the Framers and the States. Thus, the Eleventh Amendment rectified the specific error of *Chisholm* by limiting the federal judicial power in the only situation in which Article III had intimated that a State might be subjected to a common law suit in federal court. *See Hans v. Louisiana*, 134 U.S. 1, 11 (1890).

3. Because the Eleventh Amendment was intended merely to overturn *Chisholm*, the Court has repeatedly rejected the argument that the breadth of state sovereign immunity is limited by the language of the

[7] *See also Neuwirth v. Louisiana State Bd. of Dentistry*, 845 F.2d 553, 555 (5th Cir. 1988) ("[t]he 'State' for eleventh amendment purposes includes state agencies"); *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 301 (6th Cir. 1984) ("[w]hen an action is brought against a public agency or institution . . . the application of the Eleventh Amendment turns on whether said agency can be characterized as an arm or alter ego of the state"), *cert. denied*, 469 U.S. 1113 (1985); *Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp.*, 948 F.2d 1084, 1086 (8th Cir. 1991) ("[t]he Eleventh Amendment protects a bistate agency if the agency is an arm of the compacting states").

Eleventh Amendment. *See, e.g., Hans*, 134 U.S. at 20-21.[8] Thus, the doctrine of state sovereign immunity "was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 32 (1989) (Scalia, J., concurring in part and dissenting in part). *See Welch*, 483 U.S. at 487 ("The contours of state sovereign immunity are determined" not by the Eleventh Amendment, but "by the structure and requirements of the federal system."). In short, the Eleventh Amendment is emblematic of the States' sovereign immunity; it neither grants nor limits it.

4. To be sure, in ratifying the Constitution, the States surrendered some of their sovereignty, including some portion of their sovereign immunity. The Court has held, however, that the surrender was limited to what "the plan of the convention" required.

[8] In *Hans*, the Court held that while the Amendment makes no mention of suits brought against a State by its own citizens, such suits nevertheless cannot be maintained in federal court absent a waiver of immunity. 134 U.S. at 15-17. As the Court later explained:

> Manifestly, we cannot rest with a mere literal application of the words of section 2 of article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against nonconsenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the . . . postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a "surrender of this immunity in the plan of the convention."

Monaco, 292 U.S. at 322-23 (quoting *The Federalist* No. 81 (Alexander Hamilton)) (footnote omitted).

Monaco, 292 U.S. at 323. The circumstances under which the constitutional plan implied a surrender of sovereign immunity are narrow.[9]

5. The most important aspect of that surrender for present purposes is reflected in the Court's current understanding that under the commerce power, Congress can abrogate the States' immunity when "necessary and proper." Thus, in *Pennsylvania v. Union Gas*, five justices confirmed dicta in prior cases that Congress may subject States to suit in federal court when acting pursuant to the Commerce Clause. 491 U.S. at 13-23 (plurality opinion); *id.* at 57 (White, J., concurring in the judgment in part and dissenting in part). *Cf. Welch*, 483 U.S. at 475 (plurality opinion) (assuming "without deciding or intimating a view of the question" under Commerce Clause); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 252 (1985) ("[a]ssuming, without deciding" same point).[10]

If this understanding is correct, the basis for it must be that the States expressly ceded substantive legislative power to the federal government by join-

[9] The Court has recognized that the United States may sue States in federal court. Absent this authority, "the permanence of the Union might be endangered." *Monaco*, 292 U.S. at 329 (quoting *United States v. Texas*, 143 U.S. 621, 645 (1892)). It is likewise inherent in the constitutional arrangement that States may sue other States in a federal forum because "[t]he establishment of a permanent tribunal with adequate authority to determine controversies between the States . . . was essential to the peace of the Union." *Id.* at 328.

[10] It had been settled for some time that state sovereignty necessarily gives way if Congress expressly subjects States to suit pursuant to Section 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

ing a Union in which federal law would be supreme. Thus, Congress may, pursuant to its powers under the commerce clause, create a cause of action against a State and provide for its enforcement in the federal courts. *See Union Gas*, 491 U.S. at 13-23 (plurality opinion). The most significant surrender of state sovereignty was the cession to Congress of the power to make substantive law and make that law the supreme law of the land. The power to subject States to federal court suit follows from that surrender.[11]

6. Regardless of whether *Union Gas* was correctly decided, *see, e.g.*, 491 U.S. at 30-45 (Scalia, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., O'Connor and Kennedy, JJ.), there is assuredly nothing in Article III granting authority to the federal judiciary to override the States' retained immunity. Moreover, because congressional "abrogation of state sovereign immunity upsets 'the fundamental constitutional balance between the Federal Government and the States,'" *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985)), the Court has concluded that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero*, 473 U.S. at 242. *See also Dellmuth*, 491 U.S. at 230 ("evidence of congressional intent must be both unequivocal and textual"); *Hoffman v. Con-*

[11] Notwithstanding this general understanding that Congress may overcome state sovereign immunity, Congress' power is not unlimited. The Tenth Amendment embodies a core of state sovereignty beyond the scope of Congress' power. *See New York v. United States*, 112 S.Ct. 2408, 2434-35 (1992).

necticut Dep't of Income Maintenance, 492 U.S. 96, 101 (1989).

This requirement of a clear congressional directive is itself implicit in the "plan of the convention." To the extent the States can be said to have ceded "powers of abrogation," *Dellmuth*, 491 U.S. at 227-28, these powers were ceded only to Congress, not the judiciary. Having ceded to Congress the authority to subject a State to federal court suit, a State may properly insist that Congress unmistakably manifest its intention to exercise such authority before it is otherwise involuntarily subjected to suit in federal court. For the federal judicial branch to abrogate state sovereign immunity on its own, without clear and unambiguous direction from Congress, would involve an assertion of federal power not contemplated by the Framers, nor consented to by the States.

B. Bistate Agencies That Are Subject To State Control Are Presumptively Entitled To Sovereign Immunity

The upshot of the history and understanding of sovereign immunity described above, and its implications for this case, are severalfold.

1. First, issues involving the scope of sovereign immunity are fundamentally questions of the States' intentions. This approach is founded on the Court's longstanding recognition that the States retained all aspects of immunity, except what they necessarily surrendered when they ratified the Constitution and the Fourteenth Amendment or have specifically decided to waive. "Absent waiver, neither a State nor agencies acting under its control may 'be subject to suit in federal court.'" *Puerto Rico Aqueduct*, 113 S.Ct. at 687-88 (citation omitted); *see also Florida*

Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Assoc., 450 U.S. 147, 150 (1981) (per curiam) (rejecting notion that general waiver of sovereign immunity constituted waiver for Eleventh Amendment purposes).

Petitioners suggest that *Lake Country Estates* requires that bistate agencies affirmatively show that their creating States intended to grant them immunity. This reading of *Lake Country Estates* is at odds with the Court's usual approach, which requires that plaintiffs affirmatively show that the States clearly intended to waive their immunity. *See Atascadero*, 473 U.S. at 241; *Florida Nursing Home*, 450 U.S. at 150. In any event, even if a bistate agency must affirmatively show that the States which created it intended to confer their sovereign immunity on it, New York and New Jersey have clearly done so here. *See* pp. 18-20 *infra*.

2. Because the language of the Eleventh Amendment does not limit the scope of the States' sovereign immunity, *see Welch*, 483 U.S. at 487; *Hans*, 134 U.S. at 20-21, the principal issue in determining whether a state-created entity retains Eleventh Amendment immunity is whether that entity is subject to the State's control so as to render it an arm of the State. *See Mt. Healthy*, 429 U.S. at 280; *Puerto Rico Aqueduct*, 113 S.Ct. at 687-88; *Lake Country Estates*, 440 U.S. at 400-02. The Court's precedents also hold that political subdivisions such as counties, local boards and municipalities cannot claim the immunity. *See Lincoln County*, 133 U.S. at 530; *see also Mt. Healthy*, 429 U.S. at 280-81. Consistent with this framework, the Court has recognized that bistate agencies that act as arms of the

compacting States can validly assert Eleventh Amendment immunity. *Lake Country Estates*, 440 U.S. at 400-01. Thus, where "the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves" by making the entity answerable to the States' governments, the entity is entitled to the States' immunity. *Id.*

3. The rationale which has guided the Court's decisions recognizing that States and their arms are entitled to the immunity while political subdivisions such as counties, boards, and municipalities are not, is likewise instructive in determining whether a bistate agency such as the Port Authority is entitled to the defense. Political subdivisions such as counties and municipalities, while undoubtedly exercising an important "slice of state power," were not themselves party to the constitutional compact. *See generally Blatchford*, 111 S.Ct. at 2581-82 (tying sovereign immunity to the States' participation as States in the federal plan and construing the scope of immunity by looking to the nature of the constitutional compact). That is the simple historical rationale for the dichotomy established by this Court's cases between city and county governments, on the one hand, and state agencies, on the other, for Eleventh Amendment purposes. *See Mt. Healthy*, 429 U.S. at 280.

Beyond the historical fact that such units of local government are not "founding members" of the federal Union entitled to sovereign immunity, the political base or constituency of a municipality, a county, or a local district, is ordinarily only a subconstituency of a State's citizenry. Such entities are ordinarily answerable through the electoral process to the citizens within the boundaries of the particular subdivision. In contrast, the Port Authority's commis-

sioners are not answerable through the electoral process to any subconstituency (such as those who live within the geographical boundaries of the port district). Instead, they are accountable to the compacting States through the powers of appointment and removal which are vested in the state governments of New York and New Jersey.

To be sure, bistate agencies address needs which cross the respective States' boundaries and therefore may require congressional approval under the Compact Clause of the Constitution. *See* U.S. Const. art. I, § 10, cl. 3. But provided the entity remains answerable to, and acts as an instrumentality of the compacting States *qua* States, *see Puerto Rico Aqueduct*, 113 S.Ct. at 688, it is entitled to the historic mantle of sovereign immunity that each State possesses individually. As the Court stated in *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 279 (1959) (footnote omitted), bistate agencies perform "high functions in our federalism including the operation of vast interstate enterprises." And certainly, States cannot serve as laboratories for social and economic experiment if they must pay the added price of losing their Eleventh Amendment immunity whenever the creation of a bistate agency is the best way to meet the changing needs of their citizens. *Cf. Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545-47 (1985) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 226 (1821) (noting that "[t]he science of government . . . . is the science of experiment"). Because a suit against such an agency is a suit against a sovereign, the agency is entitled to whatever sovereign immunity was conferred on it by the compacting States.

4. The breadth of the States' sovereignty as members of the federal Union, and the political accountability of the entity claiming immunity, undermine petitioners' narrow focus on whether a judgment against PATH will be paid directly from the treasuries of either compacting State. *See* Pet. Br. 33-38. That the States put their full faith and credit behind the entity may offer some affirmative indication that the entity is answerable and responsible to the compacting States. But the central issue is one of *political*, not financial, organization. Sovereign immunity is more than an expedient for safeguarding the state treasury. As the Court explained in *In Re Ayers*, 123 U.S. 443, 505-06 (1887), the amendment "should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose." Thus, the Court recently stated, the

> claim that the Eleventh Amendment confers only protection from liability misunderstands the role of the Amendment in our system of federalism: "[t]he very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." The Amendment is rooted in a recognition that the States, although a union, maintain attributes of sovereignty, including sovereign immunity. It thus accords the States the respect owed them as members of the federation.

Puerto Rico Aqueduct, 113 S. Ct. at 689 (citations omitted). *See also id.* at 689 n.5 ("The Eleventh Amendment is concerned not only with the States' ability to withstand suit, but with their privilege not to be sued.").

5. The Court's more recent teachings on the Eleventh Amendment have one further significance. This Court historically has been reluctant to find that particular entities are vested with sovereign immunity. That reluctance should now be tempered by the understanding that such immunity can, in a proper case, be overridden by Congress where federal interests so require. The stakes were much higher when a holding that an entity was entitled to avail itself of Eleventh Amendment immunity threatened to place that entity entirely beyond the power of Congress—at least as respects the important power to require the entity to answer in damages for violations of federal law in federal court.

There is assuredly no established presumption which *precludes* bistate agencies that perform important state governmental functions from asserting Eleventh Amendment immunity. Petitioners' misguided assertion that there is such a presumption, *see* Pet. Br. 13-14, lacks any foundation in the Constitution. *Lake Country Estates* itself recognized that States can structure bistate agencies so as to retain their sovereign immunity. 440 U.S. at 401. Moreover, such a presumption is fundamentally inconsistent with the principles of federalism embodied in both the Eleventh Amendment and the structure of the Constitution. *See, e.g., Garcia*, 469 U.S. at 545-46; *Petty*, 359 U.S. at 279.

With respect to entities formed by interstate compact, Congress is given a singular opportunity to speak to the issue. If Congress has not spoken, and the entity in question performs functions for the compacting States and remains answerable to those States (*compare Lake Country Estates*, 440 U.S. at 402), that entity is entitled to a presumption of sov-

ereign immunity—the same presumption afforded any other agency "under the control" of a State. *See, e.g., Atascadero*, 473 U.S. at 239-46.

Indeed, since Congress is charged with vindicating federal authority, it is far more appropriate to place the burden on Congress to expressly provide that the entity in question may be sued in federal court, than it is to require Congress to affirmatively grant the bistate agency a special immunity from federal jurisdiction. Thus, in a case like this, where Congress has been silent, the fact that (1) the States intended their creation to enjoy sovereign immunity, and (2) their creation remains subject to control at the state level, is determinative.

II. THE PRINCIPLES LAID OUT IN *LAKE COUNTRY ESTATES* COMPEL THE CONCLUSION THAT THE PORT AUTHORITY IS ENTITLED TO SOVEREIGN IMMUNITY

The Court's analysis in *Lake Country Estates* is consistent with the doctrine described above. The two principal inquiries identified by the Court—the States' intent to confer immunity,[12] and the source of political control of the entity—clearly militate in favor of a finding that the Port Authority enjoys sovereign immunity.

1. With respect to the first inquiry, both New York and New Jersey intended to confer sovereign

[12] In *Lake Country Estates*, the Court found it significant that the compacting States "have both filed briefs in this Court disclaiming any intent to confer immunity on" that entity. 440 U.S. at 401. In contrast, New York and New Jersey have filed a brief in this case supporting the Port Authority's claim of sovereign immunity. *See* Br. *Am. Cur.* States of New Jersey, New York, *et al.*

immunity on the Port Authority. This is demonstrated by, *inter alia*, the respective statutory provisions under which "the states of New York and New Jersey consent to suits" brought against the Authority within a one year period. *See* N.Y. Unconsol. L. §§ 7101, 7107; N.J.S.A. §§ 32:1-157, 32:1-163. Such provisions would, of course, have been unnecessary if the respective States had not intended to confer sovereign immunity on their creation.[13]

Moreover, the courts of the respective States have long regarded the Port Authority as a state agency entitled to assert the States' sovereign immunity and other sovereign prerogatives. *See Trippe v. Port of New York Auth.*, 198 N.E.2d 585, 585-86 (N.Y. 1964) (Port Authority is "a governmental agency of the States of New York and New Jersey"); *Port of New York Auth. v. J.E. Linde Paper Co.*, 127 N.Y.S.2d 155, 159 (N.Y. Mun. Ct. 1953) (Port Authority has "uniformly been held to be in the position of 'the State' whenever the issue has arisen"); *Voorhis v. Cornell Contracting Corp.*, 10 N.Y.S.2d 378, 381 (City Ct. N.Y. Co. 1938) (Port Authority is the "immediate agent of two sovereigns" and "it is hard to see how there could be a clearer instance of an agency sharing the immunity of its creators");

[13] *Amici* note that for the first thirty years of its existence, the Authority was completely immune from suit. In 1951, the legislatures of New York and New Jersey provided for a partial waiver of the Authority's sovereign immunity by consenting to suits brought within a one year period. Where, as here, Congress has not abrogated the Authority's Eleventh Amendment immunity, *see Hilton v. South Carolina Pub. Rys. Comm'n*, 112 S.Ct. 560, 563 (1991), the Court should not displace the democratic choice made by the New York and New Jersey legislatures to limit the waiver of the Authority's immunity from suit.

Miller v. Port of New York Auth., 15 A.2d 262, 266 (N.J. Sup. Ct. 1939) (Port Authority is "a direct state agency . . . an alter ego of the state . . . [and a suit against the Authority is] a suit against the state itself which would . . . be clothed with sovereign immunity . . . . "). *See also Port Authority v. Bosco*, 254 A.2d 676, 678 (N.J. Super. Ct. App. Div. 1984) (Port Authority may exercise the sovereign's exemption from statute of limitations).[14]

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[14] Petitioners also attribute great significance to the compact provisions describing the Port Authority as a "body corporate and politic" and a "body, both corporate and politic." *See* Pet. Br. 17-18 (quoting N.Y. Unconsol. Laws §§ 6404, 6407). Petitioners argue that these terms "designate[ ] an entity that is similar to a political subdivision or public corporation, and not a state." *Id.* at 18. Contrary to petitioners' assertion, the use of such terms does not mean that an entity is not an arm of the State. The Court has long recognized that "[e]very sovereign State is of necessity a body politic, or artificial person, and as such capable of making contracts and holding property, both real and personal." *Cotton v. United States*, 52 U.S. (11 How.) 228, 230 (1850). There is nothing inconsistent with having such status and retaining sovereign immunity. *See id.* at 231; *see also United States v. Hess*, 317 U.S. 537, 550 (1943).

Petitioners also argue that "the term 'bodies politic' did not refer to a sovereign." Pet. Br. 19 (citing *United States v. Fox*, 94 U.S. 315 (1876)). *Fox*, however, merely construed the terms "person" and "corporation" as used in a New York devise statute. 94 U.S. at 321. *Fox* is not relevant authority for construing the meaning of terms such as "body corporate and politic" which are used in the compact. Moreover, it certainly did not address the issue of whether the term "body corporate and politic" can, as petitioners contend, only "designate[ ] an entity that is similar to a political subdivision . . . and not a state." Pet. Br. 18. In any event, the Court's decisions in *Cotton* and *Hess* demonstrate that petitioners' reliance on *Fox* is misplaced.

2. With respect to the second inquiry, it is clear that the Port Authority is subject to the control of the respective States so as to render it one of their "arms." As *amici* explain below, the Port Authority differs in several fundamental respects from the Tahoe Regional Planning Agency, which *Lake Country Estates* held was not "an arm of the State subject to its control." 440 U.S. at 402.

First, the source of the political authority exercised by the Port Authority is that of the entire compacting States. The Port Authority represents the interests of the States and is answerable to each State at the level of statewide governance. The governing body of the Port Authority, a board of twelve commissioners, is wholly subject to state authority. The Governor of each State appoints six of the commissioners; each is confirmed by their respective state legislature; each takes the oath required of state officers and serves under terms prescribed by the state legislature. *See* N.J.S.A. § 32:1-5 (West 1990); N.Y. Unconsol. L. § 6405 (McKinney 1979). Moreover, the removal of a commissioner is vested in the respective state governments, with New York's commissioners subject to removal after a hearing by the Governor, and New Jersey's commissioners subject to removal after a hearing by the state Senate. *See* N.J.S.A. § 32:2-5 (West 1990); 1930 N.Y. Laws ch. 422.

In contrast, the Tahoe Regional Planning Agency, the entity claiming immunity in *Lake Country Estates*, was expressly established as a "political subdivision" of the compacting States. *Lake Country Estates*, 440 U.S. at 401. More importantly, the compacting States ceded direct political control over the Tahoe Regional Planning Agency to local govern-

ment, authorizing local government units, cities and counties, to appoint a majority of its governing members. *Id.*[15]

Second, the exercise of authority by the Port Authority is ultimately subject to state control and oversight. It is only after the Port Authority's rules and regulations are "concurred in or authorized by the legislatures of both States" that they become "binding and effective." N.J.S.A. § 32:1-19; N.Y. Unconsol. L. § 6419. The individual votes of the commissioners are subject to veto by the respective state governors. N.J.S.A. § 32:2-6; N.Y. Unconsol. L. §§ 7151-53. And the two state legislatures jointly direct the expenditure of any surplus revenues generated by the Port Authority. N.J.S.A. § 32:1-142; N.Y. Unconsol. L. § 7002. Thus, the Port Authority is an instrument of the compacting States, subject to their direction and control.

In contrast, in *Lake Country Estates* the Court specifically noted that the authority of the Tahoe Regional Planning Agency "to make rules within its jurisdiction is not subject to veto at the state level." 440 U.S. at 402. It further noted that California's effort to subject the entity to its control had been unsuccessful. *Id.*

Thus, the Tahoe Regional Planning Agency was largely answerable at the local level, to local constituencies, and wielded its authority independently of the compacting States. The Port Authority responds at the statewide level and remains subject to state control.

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[15] Similarly, 10 of the 17 members of the Advisory Planning Commission established by the Compact were associated with local agencies, while only one was from state government. 440 U.S. at 401 n.20.

3. Petitioners suggest that one of the factors cited by this Court in *Lake Country Estates*—namely, whether a judgment would be paid directly from the state treasury—is, or ought to be, the *sine qua non* of "stateness" for purposes of Eleventh Amendment immunity.[16] *See* Pet. Br. 33-38. But nothing in the Constitution or the federal plan suggests that the issue of payment from the State's general fund ought to be determinative of sovereign immunity. As noted above, sovereignty is ordinarily regarded as a matter of political, not financial, power. *See* pp. 6-9, 16, *supra*.

To be sure, the rule of *Ex Parte Young*, 209 U.S. 123 (1908), allowing individual capacity actions against state officials, has frequently required the Court to focus on "who pays." But the issue of who will pay is important only in determining whether a suit nominally against state officials in their individual capacities (and thus apparently beyond the reach of the Eleventh Amendment) is actually a suit against the State. *See Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945) ("[W]hen the action is in essence one for the recov-

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[16] The Court cited one additional factor in *Lake Country Estates*, namely that the entity was performing a function—land use regulation—traditionally performed by local government. *Amici* question whether this factor is relevant in the analysis. Just as this Court was ultimately forced to abandon as unworkable the distinction between "traditional governmental" and "proprietary" functions, *see Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545-46 (1985), a test which distinguishes between traditional state and local functions is also problematic. The use of this criterion fails to account for the flexibility which is necessary if state governments are to respond effectively to the ever-changing needs of their citizens.

ery of money from the state, the state . . . is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) ("[T]he rule [that] has evolved [is] that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."). It is of far less significance in connection with the question whether a particular entity is a state agency.

Thus, while the fact that the obligations of an entity created by bistate compact are backed up by the general treasury funds of each State might weigh in favor of a finding that a particular bistate agency is an arm of the compacting States, the absence of direct access to the State's general revenues does not indicate that the agency is not an arm of the State. Here, for example, all of the Port Authority's funds are dedicated to state governmental purposes; its use of those funds is legislatively constrained; and its spending is subject to gubernatorial veto. Moreover, the disposition of any surplus funds is expressly subject to the control of the state legislatures.[17] Whether or not those funds can be deemed part of the general treasury, it is clear that the Port Authority's use of funds is limited to the purposes for which it was

[17] The intention and expectation at the time of the Compact clearly was to generate sufficient revenues to allow the Port Authority to be self-sustaining. That no automatic access to general tax revenues was given to the Port Authority only served to emphasize (and reinforce) that the entity was expected to generate sufficient revenue to sustain itself. Any additional revenues from the States would have to be separately appropriated. A State can set up such self-sustaining entities to handle state functions without surrendering those entities' immunity from suit.

established and continues to be subject to political control exercised by both States.

While a judgment against the Port Authority is not payable from each State's respective general revenues, to say that such a judgment is not against the States within the meaning of the Eleventh Amendment elevates form over substance. The people of New York and New Jersey have decided that it is in their common interest to create the Port Authority as a joint agency to carry out important governmental functions. Any judgment payable from the Port Authority's funds limits the agency's ability to carry out the programs which the respective state legislatures have decided to be in the commonweal. Such judgments would clearly interfere with the sovereign choices of the people of New York and New Jersey. *Cf. Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring) ("The genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires."). Accordingly, the Court should uphold respondent's defense of sovereign immunity.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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